In adopting this rule, the Commission would be tailoring its unqualified finding of impairment for unbundled local switching[220] to *only* those CLECs whose entry strategy parallels that of the incumbent, willing to offer service in all areas. This limitation would address the Court's concern in *USTA II* that CLECs may have an incentive to compete solely in low cost areas and, as a result, enjoy some potential advantage to offset its impairment.

To qualify for "ETC Impairment" status, the CLEC would be required to meet all otherwise applicable ETC requirements under the Act,[221] and to agree to serve the entire statewide service territory of the RBOC. This latter obligation is more extensive than what the law presently requires to qualify as an ETC,[222] but would assure that the ETC-qualified CLEC cannot take advantage of any "... cross-subsidization often ordered by state regulatory commissions, typically in the name of universal service.... [that] usually brings about undercharges for some subscribers (usually rural and/or residential) and overcharges for the others (usually urban and/or business)."[223]

The Joint Commenters are not advocating that the Commission find that the impairments entrants encounter pursuing universal entry strategies are permanent. Rather, the Joint Commenters propose that the Commission schedule a review for three years hence, at

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220 Although the Joint Commenters believe similar reasoning could be developed for enterprise switching under some circumstances, the Joint Commenters are limiting this proposal to the POTS services made possible when unbundled local switching is used to serve mass market customers.

221 47 U.S.C. § 214(e). *See also Procedures for FCC Designation of Eligible Telecommunications Carriers pursuant to section 214(e)(6) of the Communication Act Public Notice*, 12 FCC Rcd 22947 (1997).

222 ETC carriers can request ETC status for less than the statewide operating territory of an ILEC. *Id.*

223 *USTA I*, 290 F.3d at 422.

which time it can determine whether the additional impairments that face the universal entrant (that is, its inability to quickly build density because of its focus on competing across a much wider footprint) remain in place. It is conceivable that by that time, either universal entrants will have built sufficient density that they should be subject to the line density rule, discussed above, or alternatively, new technologies will have dramatically reduced the line density necessary to deploy facilities.

At this point, however, it would be contrary to Congress's intent for the Commission to penalize those entrants that are steadfastly pursuing an entry strategy – universal competition – that Congress clearly desired, simply because one consequence is that line density is not the primary goal of the strategy. Congress did not intend that the peculiar requirements of facilities-based entry, and its geographically narrow focus, should justify *ignoring* the additional impairments carriers experience attempting to offer POTS service to the mass market. The ETC-qualification standard proposed above would tailor availability to those carriers willing to commit to broad entry, and would provide those entrants an even footing with the incumbent who is recovering its common costs throughout its statewide market.

C. The Transition Plan In Circumstances Of Non-Impairment.

In those instances when the Commission adopts a finding of non-impairment, it must implement that finding through appropriate transitional rules that enable carriers and customers to adjust to changing conditions, as well as adopt exceptions to that finding where unique circumstances (such as the incumbent's inability to provide suitable facilities) preclude the commercial use of alternative local switching to serve mass market customers. As a starting point, the transition plan that the Commission adopted in the *Triennial Review Order* provides a useful framework, with modest adjustment, to provide CLECs and their customers the

opportunity to adjust to changing regulatory conditions.[224] It is important to note that the ILECs did not challenge the Commission's transition plan.

The critical need for reasonable transition structure has grown dramatically since the Commission adopted the *Triennial Review Order*. In the *Triennial Review Order,* the Commission recognized how important it was "to avoid significant disruption to the existing customer base,"[225] which at the time the Commission estimated at 10 million lines.[226] There are now approximately *17 million lines* served by unbundled local switching,[227] meaning it is even more important now to design an appropriate transition plan than at the time the Commission adopted the *Triennial Review Order*. Moreover, the *reasons* that the Commission provided in the *Triennial Review Order* are as valid now as when it adopted that order:

> ... the record contains substantial evidence – including cost studies submitted by the incumbent LECs themselves – that competitive carriers suffer cost disadvantages and other barriers when they self-deploy switching in some locations. There is also a need for an orderly transition to afford sufficient time for carriers to implement any necessary business and operational plans and practices to account for the changed regulatory environment, including the need to modify or revise their interconnection agreements. For example, competitive LECs may need to develop new UNE-L provisioning systems, including hiring, training, and equipping loop provisioning and switch technicians; purchase and collocate new equipment; create additional customer service and trouble maintenance groups; revise wholesale billing systems; and develop capabilities for E911 and local number portability. Moreover, our transition plan must require the incumbent LEC to unbundle its local circuit switching facilities for some limited

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224 Even though ILECs took great exception to the Commission's framework for addressing impairment, they did not disagree with the post-impairment process.

225 *Triennial Review Order* ¶ 529.

226 *Id.*

227 As of June 2004, based on RBOC quarterly earning reports for the 2nd quarter of 2004.

> period *after* a state commission has found "no impairment," because otherwise a competitive LEC would be forced to halt its advertising and customer acquisition activities between the time the state commission issued its findings and the time the competitive LEC was able to serve its customers using alternative facilities.[228]

None of these conclusions have changed: indeed, since the Commission adopted the *Triennial Review Order*, additional information has made clear that the Commission's plan should be refined to strengthen its customer protections and to facilitate the migration of customers to next generation services. The basic structure of the transition plan that the Commission adopted, however, provides a useful starting point. Specifically, the Commission's plan adopted the following time line, initiated with a finding of non-impairment:

1. Within two months, CLECs and ILECs must commit to an implementation plan with the appropriate incumbent LEC and file the plan with the state commission.

2. Within five months, CLECs may no longer request access to unbundled local circuit switching at TELRIC rates for new customers.

3. Within 13 months, each CLEC must submit orders for one-third of all of its unbundled local switching end user customers.

4. Within 20 months, each CLEC must submit orders for half of its remaining unbundled local circuit switching end user customers.

5. Within 27 months, each CLEC must submit orders for its remaining unbundled local circuit switching end user customers.

The above framework is a reasonable compromise of competing proposals, recognizing the need to protect customers and provide CLECs a meaningful opportunity to adjust their businesses to a completely different regulatory structure. There are, however, three areas where the Commission's structure must be refined.

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228 *Triennial Review Order* ¶ 529 (citations omitted).

First, the Commission should adjust its plan to recognize that there are exceptions to any general finding of non-impairment – such as instances of "no facilities" that preclude this commercial use of alternative local switching – that require continued unbundling. Second, the plan must more clearly identify the preconditions that must be in place in order for line migrations to occur, including any review of the section 271 "just and reasonable" rate for local switching when it is no longer available as a network element under section 251. Third, the plan must recognize the additional processes needed to facilitate the transition of customers and carriers to next-generation business plans and services.

1. *Exceptions to a general finding of non-impairment.*

There are several circumstances in which a general finding of non-impairment still would require unbundling because of specific circumstances causing impairment. Exceptions must include:

1. *No collocation space.* In any wire center where an RBOC cannot honor a request for collocation, the RBOC must be required to continue to offer unbundled local switching until any backlog of collocation requests is met.

2. *No loop facilities with adequate transmission quality to the customer premise.* Many ILECs have extensively deployed IDLC facilities (or other non-copper facilities) that cannot be economically unbundled. In such circumstances, however, home-run copper facilities exhibit transmission loss at a level that perceptibly reduces the customer's quality of service.[229] Consequently, wherever IDLC facilities are used to serve the customer, unbundled local switching must continue to be available. For administrative simplicity, the Commission should consider retaining unbundled local switching in any wire center (as opposed to individual customer premise) where IDLC serves more than 50% of the analog lines.

3. *Transport with concentration is unavailable as a UNE.* In many instances, CLECs will require transport and concentration to backhaul

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229 *See* Letter to M. Dortch from T. Pidgeon, VP, Federal Regulatory Affairs, GCI, CC Docket No. 01-338 (filed July 1, 2004).

> circuits to their network. Unbundled local switching should remain available as a section 251 (c)(3) UNE in any wire center where the ILEC does not offer cost-based transport and concentration[230] from that wire center to the requesting carrier's network.

2. *Preconditions to implementing the embedded base migration.*

The Commission's transition plan recognized the need for the CLEC and ILEC to agree to an implementation plan at the outset. In addition, the Commission recognized that the agency best positioned to address and monitor implementation issues was the state commission:

> We find that state commissions are well suited to monitoring the operational aspects of this migration, and we therefore incorporate a state role into our transition plan. State commissions have strong incentives both to encourage competition (as a means of providing citizens of their states with a choice of service providers) as well as to foster new investment (as a means of promoting economic growth in their states).[231]

These conclusions remain true today and there is nothing in the court's remand in *USTA II* of the state delegation concerning impairment that should change the Commission's reliance on state commissions here.[232]

The Commission should make clear, however, that the transition plan must adequately address the following preconditions before migrations can begin. The preconditions identified herein easily can be accommodated within the time-line set forth by the Commission,

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230 By concentration, the Joint Commenters refer to the availability of digital loop carrier systems at cost-based rates offered in combination with dedicated interoffice transport which permit shared channel use by individual analog circuits terminated on the digital loop carrier. As part of the implementation review, state commissions will need to assure that the ILEC has implemented the necessary OSS systems needed for this capability to be operationally available and commercially useful. *See Broadview Networks, Inc., Eschelon Telecom, Inc. and Talk America Inc., ex parte,* Docket No. 01-338 (filed Dec. 20, 2002).

231 *Triennial Review Order* ¶ 531.

232 *Id.* ¶ 531.

with any disputes regarding the plan filed within two months and resolved before the first migration deadline (the 11 month mark) is reached. Thus, by making clear exactly what the implementation plan must address, no delay to the timing of the Commission's transition plan would be necessary.

1. The withdrawal of unbundled local switching as a section 251(c)(3) UNE creates the anomalous condition where customers must change networks to retain their service provider (the CLEC), while the ILEC can tell the customer that it can change providers (by returning to the ILEC) and avoid any network disruption. Consequently, the non-discrimination standard that applies to local switching migrations must be *higher* than standards applicable to standard loop provisioning. To assure non-discrimination in the migration of the embedded base, implementation plans should:

    a. Limit migration charges applicable for embedded loops to $5.00 or less;[233]

    b. Ensure that an order for a hot cut can be provisioned in the same interval as UNE-P;

    c. Ensure that a CLEC has real-time/electronic notification when a line/order has been cut and is complete, for all types of hot cuts, to minimize the out of service period; and

    d. Allow CLECs to schedule hot cuts out of hours, if requested, with no additional charges.

2. Because BOCs are required under section 271 to offer unbundled local switching at just and reasonable rates and terms that provide the entrant a meaningful opportunity to compete, any questions regarding these rates and their accompanying terms and conditions of service must be resolved so that carriers may make an informed and rational choice between migration of lines to alternative facilities and paying the just and reasonable rate to the BOC.

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233 The $5.00 fee proposed here is patterned to mirror the pre-subscription charge used to migrate a customer to an ILEC's long distance service. Because the forced migration of CLEC lines to alternative facilities is done at the ILEC's insistence, any additional costs incurred by the ILEC's refusal to automate the migration process should be absorbed by the ILEC.

3. *Clarifications needed to facilitate next-generation migrations.*

Although some CLEC lines may be migrated to circuit switched architectures, the Commission's goal to promote advanced networks requires that the implementation plan and the ILECs' obligations under it must enable carriers to migrate customers to next-generation packet-based services as well. Specifically, the Joint Commenters recommend that the Commission make clear that the ILECs are obligated to implement OSS systems that permit the migration of the embedded base (as well as new loops) to each of the following arrangements:

- Home-run copper capable of supporting SDSL services at 1.544 mbps or better;
- DS1 UNEs, alone or in combination with DS1 or DS3 UNE transport;
- PVC in DSL arrangements provided by the BOC, interconnected to the CLEC's packet switches.

Whenever the ILEC cannot satisfy one of the configurations identified above when that particular configuration is requested by an entrant, then the circumstance should be treated as "no facilities available" and local switching must remain available as a section 251(c)(3) UNE until such time as the condition is corrected. Importantly, the ability of the CLEC to commercially use each configuration listed above requires that the OSS systems include the same OSS functionality as is available today to obtain POTS-compatible facilities. Exhibit 35 compares the ordering functionality available today for UNE-P to the functionality available to the replacement VPC/packet-switch configuration that will become its economic substitute in a next-generation competitive model. The Commission must establish operational parity to encourage the deployment of advanced services and allow the reduction in unbundling to fold into a competitive next-generation environment.

D. The Commission Must Require An Efficient Hot Cut Process.

The Commission must require all ILECs to have efficient and workable hot cut procedures in place before the ILEC can cease providing unbundled local switching as a section 251(c)(3) network element. As the Commission found in the *Triennial Review Order*, the failure of ILECs to be able to perform hot cuts efficiently and the high cost of hot cuts pose substantial barriers to entry in the mass market for competitive carriers which result in impairment.[234] Those barriers remain in effect today. As discussed below, ILEC hot cut rates vary drastically from state to state, and in many cases, are cost prohibitive. Furthermore, ILECs do not have workable procedures in place to efficiently process the volume of hot cut requests that they currently receive, which is a much smaller number than they would need to provision if the Commission eliminates unbundled local switching as a network element under section 251(c)(3). Accordingly, the Commission must ensure that all ILECs have efficient hot cut processes in place – and at reasonable rates – for single hot cuts, bulk hot cuts, and batch hot cuts, that can accommodate the volume of requests they will receive before the ILEC is permitted to cease providing local switching as a section 251(c)(3) UNE.

1. *It is essential that ILECs have efficient hot cut processes in place.*

There is no hope that CLECs will be able to serve the mass market via competitively provided local switching unless ILECs have efficient, cost-effective hot cut procedures in place. As the Commission stated in the *Triennial Review Order*, switch-based

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234 *Id.* ¶ 469 (stating, "[w]e find the issue is not how well the process works currently with limited hot cut volumes, rather the issue identified by the record...is an inherent limitation in the number of manual cutovers that can be performed, which poses a barrier to entry that is likely to make entry into a market uneconomic.") (citations omitted); *id.* ¶ 470 (stating that "[t]he cost of hot cuts, exacerbated by churn, creates a cost disparity that makes it uneconomic to serve mass market customers.") (citations omitted).

CLECs must gain access to the customer's loop facilities, which are provided primarily by the ILEC, in order to connect their switch to the ILEC's loop.[235] To be able to serve a customer using a competitive switch, the CLEC must physically transfer the customer's line from the ILEC switch to the CLEC switch, a process referred to as a hot cut or coordinated cutover. Absent the hot cut, the CLEC cannot serve that mass market customer.

There are several types of hot cuts, and the Commission must ensure that the ILEC maintains adequate procedures for each. First, competitive carriers must be able to request a hot cut of a single or several lines. Second, ILECs should have processes in place for bulk hot cuts, where a single CLEC is requesting the conversion of a large number of lines. Third, ILECs also must have processes for batch hot cuts, whereby the ILEC aggregates hot cut requests from multiple carriers and executes those requests at the same time. The Commission must require ILECs to establish and maintain processes and procedures for each category of hot cuts. The type of hot cut a carrier will need will vary based on the particular customer and the market in which the customer resides. In some situations, the carrier must be able to turn the subscriber over as soon as possible, whereas in other instances, the carrier can include the subscriber as part of a bulk and batch defined hot cut process. The Commission must prohibit ILECs from unilaterally declining to provide any of these types of hot cuts and must allow the CLEC to determine which process it will use for each customer.

Although the procedures for these hot cuts vary to some degree, there are commonalities that the Commission must require to be present in each hot cut process. Specifically, the Commission must require ILECs to have a throwback procedure in the event

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235 *Id.* ¶ 464.

that the hot cut is unsuccessful. A throwback is the process used to move an unbundled loop that the ILEC recently cut over to a CLEC's switch and is experiencing a problem, back to its original state to restore the customer's service. This process effectively reestablishes the customer with dial tone from the ILEC switch. A throwback process is necessary to prevent – or at least mitigate – service disruption to the customer.

In addition, the Commission must require ILECs to provide hot cuts for all loops in the same intervals and under the same performance criteria regardless of whether the loop is a copper loop or on a non-copper facility such as an Integrated Digital Loop Carrier ("IDLC") system. If an ILEC provides loops over IDLC, then it must perform hot cuts for those loops. Currently, not all ILECs support hot cut processes for IDLC loops when they are part of a bulk or batch project. For example, in Verizon territory, customer lines that are on non-copper facilities, such as IDLC systems, do not appear on the main distribution frame ("MDF"). As such, Verizon cannot cut over these lines to a CLEC's collocated equipment as part of the bulk or batch process using its current processes. Therefore, before submitting a hot cut request, CLECs must use Verizon's loop make-up database to determine whether any lines associated with a customer account are on IDLC facilities so that they can be excluded from the project.[236] This is a significant problem, because in some central offices there are large numbers of IDLC loops.[237] Accordingly, the Commission must require ILECs to institute bulk and batch processes for lines on an IDLC system, and maintain the availability of local switching as a section 251(c)(3) UNE for non-copper loops until such processes are operational.

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236 *New York Hot Cut Panel Testimony* at 26, Exhibit 31.

237 *Id.*

Further, as stated in section III.G. above, the lack of scalability of the hot cut process is a substantial problem. The Commission must address this obstacle before it can permit ILECs to cease providing unbundled local switching as a section 251(c)(3) UNE..

2. *The Commission should establish a ceiling for hot cut rates.*

The Commission should establish a ceiling of the rates that ILECs can charge for each type of hot cut. As discussed herein, hot cut rates vary from state to state, and are cost prohibitive in many states for CLECs serving the POTS market. Due to the high rate of customer churn, in many instances, carriers cannot recoup the cost of the hot cut before the POTS subscriber moves to another carrier. Furthermore, there is no cost basis for hot cut rates to be as high as they are in certain states. Accordingly, the Commission should adopt a maximum hot cut rate of $5.00 for individual hot cuts, which is consistent with the safe harbor rate for presubscribed interexchange carrier (PIC) – change charges.[238] The Commission also should permit states to adopt their own hot cut rate that takes into account state-specific costs. In doing so, however, the states should be precluded from adopting a higher rate than $5.00 for individual hot cuts.

The Commission should set a ceiling for hot cut rates that is consistent with the ILEC's charge for a preferred carrier change. Making the maximum hot cut rate consistent with the costs of a preferred carrier change prevents BOCs from gaining an undue advantage in the bundled local telecommunications market. Today, BOCs are adding long distance lines at a rapid pace while CLECs still are attempting to gain market share. A hot cut rate that is in parity

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238 *See Presubscribed Interexchange Carrier Charges, Further Notice of Proposed Rulemaking*, FCC 04-96, ¶ 1 (rel. Apr. 23, 2004) (stating that PIC-change charges currently are subject to a $5.00 safe harbor) (citations omitted).

with the long distance carrier change charge that the BOC incurs will allow BOCs and CLECs an equal ability to compete in the bundled services market.

Furthermore, consistent with the Act, hot cut rates must be TELRIC-compliant.[239] To comply with TELRIC principles, hot cut rates (and the underlying cost studies used to create those rates) should employ efficient and forward looking costing principles. The studies should reflect hot cut processes that minimize human intervention through the use of fully automated and integrated OSS, and that eliminate unnecessary work and establish efficient work practices. This procedure would streamline the hot cut process and substantially reduce the need for manual intervention in the hot cut process. Indeed, as the Commission recognized in the AT&T/WorldCom/Verizon arbitration "[w]ith an efficient OSS in place, there should be limited need for the types of manual coordination activities that Verizon claims are unnecessary."[240] Reducing the amount of manual intervention should result in lower hot cut rates.[241]

In addition, hot cut rates only should include the nonrecurring costs associated with performing the hot cut itself. In other words, costs associated with constructing or maintaining the ILEC network should not be included in hot cut rates. Disconnection charges

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239 *Triennial Review Order*, Statement of Commissioner Abernathy.

240 Petition of WorldCom, Inc., *Pursuant to section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration*, 18 FCC Rcd 17,722, ¶ 604 (2003).

241 CLECs in various states have challenged ILEC hot cut rates, finding numerous holes in their proposed cost studies. One of the primary problems CLECs identified is that ILECs overestimated the amount of time that it took to perform the hot cut tasks. *See, e.g., Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching in SBC Illinois Mass Market*, Rebuttal Testimony of Steven E. Turner on Behalf of AT&T Communications of Illinois, Inc., McLeodUSA Telecommunications Services, Inc., TCG Chicago, and TCG Illinois, ICC Docket No. 03-0593, at 5 (Feb. 16, 2004). Attached hereto as Exhibit 36.

also should not be included in hot cut rates. CLECs should not incur any additional charges if the ILEC needs to move a customer loop from IDLC to copper. ILECs incur disconnection costs, if any, not when the CLEC requests the hot cut, but some period thereafter, presumably when the CLEC customer wishes to terminate service.[242]

As stated above, when adopting hot cut rates based on forward-looking principles, hot cut rates for a single coordinated cutover should be no greater than the preferred carrier change charge applied when a customer changes long distance service providers. The Commission also should mandate that the rates for batch and bulk hot cuts should be reduced by volume discounts to reflect efficiencies in conducting more hot cuts at one time. State commissions are in the best position to determine specific hot cut rates in their states. The Commission, however, should require that states set hot cut rates no higher than the rates set forth herein.

3. *The FCC must establish standards for hot cuts.*

The Commission must require ILECs to adopt workable and efficient hot cut procedures. In those situations, if any, for which the Commission finds no impairment, it must require ILECs to continue to provide unbundled local switching as a section 251(c)(3) UNE until the ILEC has workable hot cut procedures in place, including procedures applicable to all types of hot cuts, including, individual hot cuts, large job/project/bulk hot cuts, and batch hot cuts, as well as the inclusion of ILDCs in the large job/project/bulk hot cut processes. As part of those procedures, it is essential that all ILECs have an automated provisioning tracking system in place

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242 *See Panel Testimony on Bulk Hot Cuts and Associated Non-recurring Costs on Behalf of AT&T Communications of New England, Inc., and Broadview Networks,* Massachusetts D.T.E. 03-60, at 87 (Feb. 6, 2004). Attached hereto as Exhibit 37.

to facilitate hot cuts and to remove many of the unnecessary, time-consuming manual provisioning steps, which are a recipe for additional error.

Currently, carriers do not have access to workable systems such that they can seamlessly submit their orders and follow those orders from submission through completion.[243] Separate and apart from the problems with the order process and tracking, there are problems with performing the hot cut itself. Specifically, evidence in the record from the state proceedings indicates that the processes are inefficient and duplicative. As one example, in reviewing Verizon's hot cut processes, the New York Public Service Commission stated, "different tasks are performed by different employees on different days, so it does not necessarily follow that there is no duplication if one employee divides tasks differently from another."[244] Each of these problems stems from the ILEC's failure to have a workable and electronic provisioning system in place.

Accordingly, in an attempt to streamline the hot cut process and mitigate the potential for errors, the ILEC must create and provide access to a system similar to Verizon's Wholesale Provisioning Tracking System ("WPTS") that enables a CLEC to monitor, track and verify its hot cut process from the initial submission of the request until the completion of the cutover. The WPTS also should enable CLECs to take action regarding issues that arise throughout the hot cut process.

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243 *See* Hou Aff. ¶ 13.

244 *New York Hot Cut Order* at 33, Exhibit 32.

The Commission must require each ILEC to have two methods of interfaces to WPTS – Web GUI and XML using the HTTPS delivery protocol.[245] The Web GUI interface must allow CLECs the ability not only to view the data but also to interact, sort, and download data on the screen into spreadsheets. The XML using the HTTPS delivery protocol must allow a system to system application interaction between the ILEC WPTS and the CLEC system.

At a minimum, the Commission must require the WPTS to include the following functions for both the Web GUI presentation and the XML interface:

- Order acceptance by the ILEC. The order acceptance must include the projected hot cut/installation date and time, ILEC order number, CLEC purchase order numbers, telephone number, ILEC circuit IDs, and ILEC technician IDs;
- Immediate identification of provisioning issues: The interfaces must enable the identification of provisioning issues early in the hot cut process. Specifically, the interfaces should identify issues such as the fact that the loop is served by IDLC facilities, non-copper facilities, as well as indicating whether there are no facilities available or if the ILEC is otherwise unable to support the data speeds requested. Requiring immediate identification of provisioning issues is essential to a timely hot cut process.
- Status fields: The interfaces should contain status fields that identify where the order is in the provisioning process and provide any jeopardy notifications.
- Immediate completion notification: The interfaces should identify immediately when the hot cut r has been completed.
- Usability features: The interfaces should provide CLECs with the ability to sort and download all of the data present on the screen, and to selectively sort and download data by day, order status, or location.

To date, no ILEC has an interface in place that includes all of the above-listed requirements. Verizon, however, provides the best example of an ILEC's system that is in the

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245 Both of these interfaces are well-known throughout the industry. Hou Aff. ¶ 17.

process of becoming more functional. The features and functions of Verizon's WPTS have improved throughout the three years that it has been operational, but there are still enhancements necessary to leverage the current WPTS workflow functionality for large job/project/bulk hot cut processes, and installation for new loops.[246] Verizon's WPTS contains certain features and functions for single hot cuts but not for bulk and batch processes. For example, in a single hot cut process, Verizon will note the results – via XML or Web GUI – of a dial tone check. This same information is not available for the bulk and batch cut processes.[247] As another example, carriers can obtain an electronic notification of a single hot cut, but not of batch or bulk hot cuts. As a result, carriers do not have all of the information that they need readily available, including information suggesting that there is a problem with processing the requested conversion.[248] The Commission must require Verizon, and all other ILECs, to provide these notifications for each type of hot cut (including hot cuts performed through the bulk and batch processes) and for new loop installations.

E. The Commission Must Require BOCs To Have Bona Fide Section 271 Offerings In Place Prior To The Withdrawal Of Any UNE.

Under the plain language of the Act, as the Commission repeatedly has recognized, BOCs have a separate and independent obligation to make available the network elements enumerated in section 271 – loops, dedicated transport, switching, and signaling – regardless of whether the BOCs are required to make available those network elements under

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246 *See id.* ¶ 19. (describing necessary enhancements).

247 *Id.*

248 *See id.*

section 251 of the Act.[249] In *USTA II*, the court agreed that this obligation is separate and distinct from the obligations set forth in section 251 of the Act.[250] This obligation applies once BOCs have gained authority under section 271 to provide in-region interLATA service. In other words, if a BOC did not want to subject itself to the obligations set forth in section 271 to provide the enumerated network elements, then it had the option of not pursuing authority to provide in-region interLATA services. There are no exceptions to this explicit statutory requirement.[251] Having gained in-region long distance entry, the BOCs cannot now renege on their end of the bargain.

The Commission does not have the authority – nor is there any need – to modify this requirement.[252] To the extent that an existing network element is "de-listed" under section 251, carriers must know the rates, terms, and conditions at which they may purchase such network elements under section 271 so that they can develop and modify their business plans to the extent possible in order to continue to serve their customers without service disruptions. Therefore, the Commission must require BOCs to have *bona fide* offers for section 271 network

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249 The obligations set forth in section 271 pertain to BOCs, a subset of ILECs.

250 *USTA II*, 359 F.3d at 588.

251 BOCs are required to provide the enumerated network elements, including local switching, shared transport, and loops, regardless of whether they are used for broadband or narrowband services. The Commission must reject BOC petitions that the Commission forbear from making available certain network elements. *See* Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), CC Docket No. 01-338 (filed Oct. 24, 2003); BellSouth Petition for Clarification and/or Partial Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147 (filed Oct. 2, 2003); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket No. 03-235 (filed May 3, 2004).

252 In the *Permanent Rules NPRM*, the Commission requested comment on whether the "independent section 271 unbundling obligations" should be clarified or modified in light of *USTA II*. *Permanent Rules NPRM* at n. 38.

elements in place, including rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with sections 201 and 202 of the Act, before the BOC can withdraw the availability of any section 251 UNE.

1. *BOCs are required to make available network elements under section 271 even if they are not required to be provided under section 251.*

Under the plain language of the Act, and as the Commission repeatedly has recognized, BOCs have a separate and independent obligation to make available certain network elements under section 271 of the Act even if they no longer are required to make available those network elements under section 251 of the Act. In the *Triennial Review Order*, the Commission reiterated that section 271 imposes a separate and distinct obligation on BOCs to make available certain network elements.[253] The Commission emphasized that "the plain language and the structure of section 271(c)(2)(B) establish that BOCs have an independent and ongoing access obligation under section 271."[254]

In *USTA II*, the court agreed with the Commission that BOCs have a separate and independent obligation to make available section 271 network elements to requesting carriers.

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253 *Triennial Review Order* ¶¶ 653 (stating, "we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251."). The Joint Commenters incorporate by reference the PACE Coalition's comments and oppositions to BOC petitions for reconsideration and forbearance of BOC obligations to make network elements available under 271 of the Act. *See* PACE Coalition Opposition to BellSouth's Petition for Clarification and/or Partial Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147 (filed Nov. 6, 2003); Opposition of the PACE Coalition and Talk America Inc. to Verizon's Petition for Forbearance, CC Docket No. 01-338 (filed Nov. 17, 2003); Opposition of the PACE Coalition and Talk America Inc. to SBC Communications Inc.'s Petition for Forbearance, WC Docket No. 03-235 (filed Dec. 2, 2003).

254 *Triennial Review Order* ¶ 654.

The court found that the "FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§251-52. In other words, even in the absence of impairment, BOCs must unbundle local loops, local transport, local switching, and call-related databases in order to enter the interLATA market."[255] The Commission correctly interpreted the statute, which sets forth an explicit independent obligation to provide these checklist items regardless of whether they are unbundled under section 251 of the Act, and the court in *USTA II* upheld the Commission's interpretation. The Commission does not have the authority to modify this explicit statutory obligation nor should it.[256]

2. *Carriers need certainty prior to the elimination of UNEs.*

Even if the Commission removes mass market local switching from the required list of UNEs under section 251(c)(3), it must continue to require BOCs to provide local switching as a UNE at TELRIC rates until the BOC has a *bona fide* offering for the local switching network element under section 271 of the Act. The BOC also must have existing procedures in place for carriers to use to obtain that network element before the BOC is permitted to cease providing unbundled local switching as a section 251(c)(3) UNE. The Commission cannot eliminate local switching as a UNE and leave CLECs to the mercy of the BOCs while the BOCs "contemplate" a local switching offering under section 271 of the Act.

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255 *USTA II*, 359 F.3d at 588.

256 In various petitions, BOCs have argued that the Commission has the authority to forbear from enforcing obligations imposed under section 271 of the Act. The Joint Commenters disagree that the Commission has the authority, under section 10 of the Act, 47 U.S.C. § 160, to forbear from enforcing the obligations set forth in section 271, and incorporates by reference the PACE Coalition's oppositions to those petitions. *See supra* note 249 (identifying the PACE Coalition oppositions).

Already BOCs have set forth their belief that they are free to unilaterally establish so-called market rates for UNEs delisted under section 251(c)(3). As proposed, these rates are substantially in excess of the rate for section 251(c)(3) UNEs. As one example, BellSouth's rate for local switching under Section 271 of the Act is 4000% of its TELRIC rate.

A recent case before the Tennessee Regulatory Authority ("TRA") illustrates this problem. During negotiations with ITC^DeltaCom, BellSouth demanded recurring and non-recurring rates for local switching subject to the *Triennial Review* Order's four-line restriction, that bore no relationship to costs, by any measure. BellSouth's proposed rate of $14.00 per port was 640% above the TELRIC rate established by the TRA, while its non-recurring rate of $41.50 for a simple migration was 4,000% above the corresponding cost-based rate.[257] The "record evidence" that BellSouth supplied in support of its unreasonable demand was laughable, as became apparent through the discovery process:

> BellSouth has been unable to locate *anyone* with knowledge or information of the process used to arrive at the "market rate" of $14.00.
>
> BellSouth has been unable to locate *any* workpapers or documents that may have existed or been used by the individuals who developed the $14.00 market rate.[258]

The just and reasonable pricing standard is not a license to charge whatever rate the BOC wishes for a section 271 network element. The TRA exercised its responsibility judiciously and in accordance with the Act in setting an interim just and reasonable rate of

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257 *See, e.g.,* BellSouth Response to ITC^DeltaCom's Petition for Arbitration, at Att. 2 (proposing local switching rates).

258 BellSouth Response to ITC^DeltaCom's 1st Interrogatories, Items 47 and 48 (emphasis added).

$5.08.[259] Without processes and procedures in place for review of section 271 rates and terms before they are implemented by a BOC, CLECs risk being able to provide continued uninterrupted service to end user customers, and to market services to potential new customers.

In addition, the Commission must require the BOCs to provide a section 271 local switching offering that has the same functionality as unbundled local switching offered under section 251(c)(3). There is no basis for any distinction in the features and functions of the network elements required to be made available under section 251 and those required to be made available under section 271. Section 271 simply requires BOCs to make available "local switching unbundled from transport, local loop transmission, or other services."[260] There is no distinction between this local switching and the local switching that the Commission required to be made available under section 251 of the Act. If the Commission fails to expressly reiterate that section 271 network elements must have the same functions and features as section 251 UNEs, then end user customers risk service interruptions or disconnections while their carriers attempt to obtain an equivalent product from the BOC.

Carriers using ILEC-provided local switching to serve the POTS market must have certainty to continue to provide service to mass market customers. These carriers have made specific business decisions to serve or not serve customers in reliance on the availability of unbundled local switching. CLECs and their customers face significant service disruptions if BOCs suddenly deny access to unbundled local switching on the ground that it has been delisted

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259 Importantly, nowhere in its petition does BellSouth allege that the interim local switching rate set by the TRA in the ITC^DeltaCom/BellSouth arbitration fails to comply with the just and reasonable pricing standard, nor could it.

260 47 U.S.C. § 271(c)(2)(B)(vi).

as a section 251(c)(3) network element by the Commission. If the Commission does not require BOCs to have valid section 271 offerings in place before removing their section 251(c)(3) offerings, then customers that purchase their service from a competitive carrier are at risk of service disruptions and loss of service altogether.

3. *BOCs must provide combinations of network elements and permit commingling.*

The Commission also must clarify that the BOCs are required to make available section 271 network elements in combination with other UNEs made available under section 251, at no additional charge to the requesting carrier, and that BOCs are required to commingle network elements with services.[261] In *USTA II*, the court acknowledged that the independent unbundling requirements under section 271 of the Act are governed by the nondiscrimination obligations set forth in section 202 of the Act.[262] Permitting the BOCs to combine network elements within their own network for their own benefit, but declining to require BOCs to combine network elements for competitors – regardless of whether those network elements were

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261 The terms commingling and combining are similar, with both referring to situations where network facilities and/or functions that also are available discretely instead are obtained in an interconnected manner. Examples include a DS1 loop facility being obtained along with (and connected to) a DS1 transport facility, or an analog loop purchased with a local switch port. In the *Triennial Review Order*, the Commission distinguished between commingling and combinations as follows:

> By commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services.

Triennial Review Order ¶ 597.

262 *USTA II*, 359 F.3d at 590.

derived from section 251 or section 271 – would constitute unjust and unreasonable discrimination in violation of section 202 of the Act.

In *USTA II,* the court confirmed that the independent unbundling obligation under section 271 is governed by the *general* nondiscrimination obligation under section 202.[263] Under section 202 of the Act, it would constitute unjust and unreasonable discrimination for any BOC to refuse to combine network elements for its own use while not making the same network elements available in combined form to requesting carriers. In the *Triennial Review Order,* the Commission stated that it would be discriminatory for a BOC to do something for its own use but not for a requesting carrier.[264] Specifically, the Commission required ILECs to make routine network modifications to unbundled transmission facilities.[265] The Commission defined routine network modifications as "those activities incumbent LECs regularly undertake for their own customers."[266] In the present situation, a BOC similarly should combine and commingle network elements for requesting carriers, regardless of whether those network elements are made available under section 251 or section 271. To do otherwise would constitute unjust and unreasonable discrimination in violation of section 202 of the Act, because BOCs would be giving an undue preference to their own affiliates to the detriment of requesting carriers. Indeed, the Commission acknowledged that this conduct would be discriminatory in the *Triennial Review Order* and stated that "a restriction on commingling would constitute an 'unjust and

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263 47 U.S.C. § 202(a) (stating "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service …").

264 *Triennial Review Order* ¶ 639.

265 *Id.* ¶ 632.

266 *Id.* ¶ 634.